

No. 82-2069

FILED

AUG 17 1983

ALEXANDER L. STEVENS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROGER ALAN COX, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's convictions for making false statements in violation of 18 U.S.C. 1001.

2. Whether the trial court properly instructed the jury concerning the false statement offenses.

3. Whether the trial court was required to submit the question of materiality to the jury in connection with the false statement offenses and whether the finding of materiality was supported by the evidence.

4. Whether information protected under 26 U.S.C. 5848(a) was used against petitioner at trial.

5. Whether the trial court's reference to sentencing in its instructions to the jury denied petitioner a fair trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	11
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>Adickes v. S. H. Kress & Co.</i> , 398 U.S. 144	5
<i>Brown v. Ohio</i> , 432 U.S. 161	10
<i>Glasser v. United States</i> , 315 U.S. 60	3
<i>Isenberg v. United States</i> , cert. denied, No. 82-967 (May 16, 1983)	6
<i>Lawn v. United States</i> , 355 U.S. 339	5
<i>Sinclair v. United States</i> , 279 U.S. 263	6
<i>United States v. Abadi</i> , 706 F.2d 178, cert. pending, No. 82-1954 (filed June 2, 1983)	6
<i>United States v. Apfelbaum</i> , 445 U.S. 115	9
<i>United States v. Bernard</i> , 384 F.2d 915	6
<i>United States v. Clancy</i> , 276 F.2d 617, rev'd, 365 U.S. 312	6
<i>United States v. Diaz</i> , 690 F.2d 1352	7
<i>United States v. East</i> , 416 F.2d 351	7

IV

Page

Cases—Continued:

<i>United States v. Fern</i> , 696 F.2d 1269	5, 8
<i>United States v. Irwin</i> , 654 F.2d 671, cert. denied, 455 U.S. 1016	6, 7
<i>United States v. Ivey</i> , 322 F.2d 523, cert. denied, 375 U.S. 953	6
<i>United States v. Lichenstein</i> , 610 F.2d 1272, cert. denied, 447 U.S. 907	8
<i>United States v. Lovasco</i> , 431 U.S. 783	5
<i>United States v. Markham</i> , 537 F.2d 187, cert. denied, 429 U.S. 1041	7
<i>United States v. McIntosh</i> , 655 F.2d 80, cert. denied, 455 U.S. 948	6
<i>United States v. Richmond</i> , 700 F.2d 1183	6
<i>United States v. Valdez</i> , 594 F.2d 725	6, 7
<i>United States v. Voorhees</i> , 593 F.2d 346, cert. denied, 441 U.S. 936	8
<i>United States v. Wolf</i> , 654 F.2d 23	7
<i>Weinstock v. United States</i> , 231 F.2d 699	6

Constitution, statutes and regulations:

U. S. Const. :

Amend. V:

Double Jeopardy Clause	10
Self-Incrimination Clause	9
18 U.S.C. 371	2
18 U.S.C. 545	2, 8, 9, 10

Constitution, statutes, and regulations—Continued:

18 U.S.C. 924(a)	2
18 U.S.C. 1001	1, 4, 5, 6, 7
26 U.S.C. 5848	3, 9
26 U.S.C. 5848(a)	9
26 U.S.C. 5848(b)	9, 10
22 C.F.R. 123.02	7
22 C.F.R. 126.01	7
27 C.F.R. 47.52(a)	7
27 C.F.R. 178.112(b)	7
27 C.F.R. 179.88	8

Miscellaneous:

2 E. Devitt & C. Blackmar, <i>Federal Jury Practice and Instructions</i> (3d ed. 1977 & Supp. 1980)	6
---	---

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2069

ROGER ALAN COX, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A24) is reported at 696 F.2d 1294.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1983. A petition for rehearing was denied on April 18, 1983 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on June 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on seven counts of making false statements in connection with importation of submachine guns into the United States, in violation of 18 U.S.C. 1001 (Counts 2-8), two counts of making false statements in records required to be

maintained by firearms dealers, in violation of 18 U.S.C. 924(a) (Counts 9-10), two counts of smuggling submachine guns into the United States, in violation of 18 U.S.C. 545 (Counts 11-12), and one count of conspiring to smuggle submachine guns, in violation of 18 U.S.C. 371 (Count 1). He was sentenced to a total term of 60 years' imprisonment, all but one year of which was suspended, and to a five-year term of probation (Pet. App. A3-A4).

1. The evidence at trial (see Pet. App. A4-A6) showed that petitioner is a federally licensed firearms dealer based in Athens, Georgia. In 1978 and 1979, petitioner purchased surplus Guatemalan Army firearms through Ronald J. Martin, a gun dealer located in Miami, Florida. In May 1979, Martin, petitioner, and co-defendant Edward Faust, a California firearms dealer,¹ traveled to Guatemala to inspect firearms and to consummate a sales transaction. After inspecting the weapons, petitioner and Faust purchased 5,200 firearms, including 100 Russian-type Degtyarev DP 7.62 millimeter submachine guns, for approximately \$280,000 (I Tr. 85-90). Petitioner recognized that the submachine guns were of Russian origin (*id.* at 91-92), but he told Faust that "the guns would have to be called Guatemalan in order to allow them to be imported * * * into the U.S." (*id.* at 95).

Thereafter, petitioner and Faust arranged for shipment of the weapons from Guatemala to the "foreign trade zone" administered by the United States Customs Service in San Francisco (I Tr. 94). During the next few months, petitioner filled out applications for import permits and related forms, on which he identified the guns as "Guatemalan Model 1938" and Guatemala as the place of manufacture (Pet. App. A6).

¹Faust pleaded guilty to a reduced charge and testified for the government at petitioner's trial (I Tr. 78-81).

2. The court of appeals affirmed (Pet. App. A3-A24). The court concluded that the government had presented sufficient evidence to prove that petitioner knew the guns were not made in Guatemala (*id.* at A6-A8); that the trial court did not err in excluding certain expert testimony about CIA activities (*id.* at A8-A11); that the jury instructions were proper (*id.* at A11-A20); that petitioner's conviction on two counts did not violate the exclusionary rule set forth in 26 U.S.C. 5848 (Pet. App. A20-A23); and that the question whether the costs of prosecution were dischargeable in bankruptcy should be decided by the bankruptcy court (*id.* at A23-A24).

ARGUMENT

1. Petitioner contends (Pet. 26-29) that there was insufficient evidence of the "objective falsity" of his statements that the firearms he had purchased were manufactured in Guatemala. That contention is contradicted by the record. The government's expert witness testified, based on design, appearance, and markings, that the weapons were produced in the Soviet Union (IV Tr. 223-225). In addition, he testified that he had never heard of a "Guatemalan Model 1938" until petitioner's trial and that to his knowledge no arms were ever manufactured in Guatemala (*id.* at 231). Petitioner's own expert witness acknowledged on cross-examination that none of the firearms in question had been manufactured in Guatemala, and that he, too, had never heard of a "Guatemalan Model 1938" or of any manufacture of guns in Guatemala (III Tr. 109). Several witnesses testified that petitioner himself referred to the firearms as "Russian" (I Tr. 28, 29-30, 91-95; see also *id.* at 185). That evidence, viewed in the light most favorable to the government (see *Glasser v. United States*, 315 U.S. 60, 80 (1942)), was clearly sufficient to prove the falsity of petitioner's statements that the firearms were manufactured in Guatemala.

IN THE SUPREME COURT OF THE UNITED
STATES

OCTOBER TERM, 1982

ROGER ALAN COX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

INTRODUCTION

The principle issue presented by
this case is whether a conviction can
rest upon alleged misstatements, where
the issue of the objective falsity of

TABLE OF CONTENTS

1	Introduction
3	Argument
9	Conclusion

SEP 3 1983

ALEXANDER L. STEVENS

Supreme Court of the United States

October Term, 1982

IN THE

ROGER ALAN COX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

FOR THE ELEVENTH CIRCUIT
THE UNITED STATES COURT OF APPEALS
PETITION FOR A WRIT OF CERTIORARI TO
REPLY BRIEF OF PETITIONER IN SUPPORT OF

ALAN M. DERBOWITZ
30 Elmwood Avenue
Cambridge, Massachusetts 02138
(617) 661-1965

NATHAN N. DERBOWITZ
150 East 58th Street
New York, New York 10155
(212) 355-6466

Attorneys for Petitioner

VICTORIA B. FISHER
Of Counsel